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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1978

STEVEN WAYNE MITZNER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 74-5063

JOHN ROBERT HECK, JR., PETITIONER

v.

UNITED STATES OF AMERICA

No. 74-5073

ARMIN R. MOTHS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 74-5086

EDWARD F. ROSS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals are reported at 499 F.2d 778 and 499 F.2d 791.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1974. Timely petitions for rehearing were denied on June 5, 1974. The petition for a writ of certiorari in No. 73-1978 was filed on July 5, 1974. Mr. Justice Douglas extended the time for filing petitions for writs of certiorari in Nos. 74-5063, 74-5073, and 74-5086 to August 5, 1974. The petition in No. 74-5063 was filed on August 2, 1974; the petitions in Nos. 74-5073 and 74-5086 were filed on August 5, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether to establish a conspiracy to assault federal officers the government must prove that the conspirators knew of the victims' federal status.

2. Whether the alleged illegality of the government's seizure of petitioner Heck's property constitutes a defense to assault and conspiracy charges against petitioners stemming from their physical attacks on Internal Revenue Service agents.

3. Whether courtroom security measures denied petitioners a fair trial.

4. Whether the failure to record grand jury testimony constitutes reversible error.

5. Whether the government withheld exculpatory evidence.
6. Whether 18 U.S.C. 371 is constitutional.
7. Whether there were various trial errors.

STATEMENT

A grand jury in the Southern District of California returned an indictment which charged that petitioners and Eric Moths, Christopher Bates, Stuart Dingwald, and Henry Hohenstein had forcibly attempted to rescue property that had been seized by the Internal Revenue Service, in violation of 26 U.S.C. 7212(b) (count 2), had conspired to commit that offense, in violation of 18 U.S.C. 371 (count 1), and had conspired to assault and interfere with IRS agents engaged in performance of their official duties (18 U.S.C. 111), in violation of 18 U.S.C. 371 (count 3). The indictment further alleged that petitioners Burnham, Armin Moths, Steven Mitzner, James Mitzner, Charles Mitzner and defendants Eric Moths and Dingwald assaulted and interfered with IRS agents engaged in performance of their official duties, in violation of 18 U.S.C. 111 (counts 4-10).

After a joint trial [1] with co-defendants Eric Moths and Bates, all the petitioners were convicted on counts 1 and 3. In addition, Steven Mitzner was convicted on count 5 and acquitted on count 2; James Mitzner was convicted on count 8 and acquitted on count 2; Charles Mitzner was convicted on count 9 and ac-

[1] Co-defendant Dingwald was granted a severance.

quitted on count 2; Burnham was convicted on counts 2 and 4; Armin Moths was convicted on counts 2 and 6; Ross was acquitted on count 2, and Heck was convicted on count 2.[2]

Steven Mitzner was sentenced to three years' probation and fined $1,000 on count 1; he was also fined $1,000 on counts 3 and 5, but these fines were to be concurrent with that on count 1. James Mitzner was sentenced to three years' probation and fined $250 on count 1; on counts 3 and 8, the court imposed $250 fines concurrent with that on count 1. Charles Mitzner was sentenced to three years' probation and fined $1,000 on count 1; on counts 3 and 9, the court imposed $1,000 fines concurrent with that on count 1. Burnham was sentenced to three years' probation and fined $1,000 on count 1; the court also imposed fines of $500 (count 2) and $1,000 (counts 3 and 4), concurrent with the fine on count 1. Armin Moths was sentenced to three years' probation and fined $1,000 on count 1; the court also imposed fines of $500 (count 2) and $1,000 (counts 3 and 6), concurrent with the fine on count 1. Ross was sentenced to three years' probation and fined $1,000 on count 1, and the court imposed a concurrent $1,000 fine on count 3. Heck was sentenced to three years' probation and fined $1,000 on count 1; the court also im-

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[2] Co-defendant Eric Moths was convicted on count 2 and acquitted on counts 1, 3, and 7. Co-defendant Hohenstein was convicted but granted a new trial by the trial court. Co-defendant Bates was convicted on count 2.

posed fines of $500 (count 2) and $1,000 (count 3), concurrent with the fine on count 1.

On appeal, the court of appeals reversed all convictions on counts 1 and 2, pertaining to the rescue of seized property, due to the insufficiency of the evidence, but affirmed the convictions on the remaining counts. 499 F.2d 778. A petition for rehearing was denied. 499 F.2d 791.

At trial the evidence showed that on October 19, 1971, petitioner Heck and his wife filed individual income tax returns for the years 1968 and 1969 showing an unpaid income tax liability in the amounts of $2,371 and $3,212 for those respective years (R. 148-149). On December 3, 1971 the Internal Revenue Service made an assessment of those taxes and mailed a notice of assessment to Heck (Tr. 241, 150; R. 149). No response was received by the Service, and on March 8, 1972, a second notice of assessment was sent (R. 149-150). Eventually the Hecks were contacted personally by IRS agents. When the assessment still remained unpaid, a tax lien was filed on March 23, 1972 (Tr. 215).

On May 4, 1972, Revenue Officers Richard Sella and George Williams went to the Heck Transfer and Storage Company, a San Diego concern owned by petitioner Heck, and again requested payment of the delinquent income taxes. When Heck refused to make payment, the officers told him that his property would be seized at that time (Tr. 21). Heck told the officers to leave, and they telephoned Special Agents Thomas Clovis and Robert Meyer for assistance.

Those agents arrived and warned petitioner Heck that if he attempted to interfere with the seizure he would be subject to arrest (Tr. 863-864). A copy of the levy was provided to Heck along with notices of seizure relating to the business property and vehicles. Notices of seizure were posted on the doors of the premises and on vehicles near the building (Tr. 220-221). Heck was allowed to remove some of his personal belongings from the building (Tr. 286, 321).

Petitioner Heck learned of the existence of an organized tax protest group and telephoned Arizona to ask its leader for assistance (Tr. 1122, 1130). The leader placed Heck in contact with a local representative of the organization in the southern California area. Heck arranged with that person for a demonstration in San Diego on May 9 by members of the organization (Tr. 1130-1131).

On the morning of May 9, petitioner Heck met with the other petitioners and co-defendant Bates in a parking lot across the street from the IRS office in San Diego (Tr. 333, 1159-1160, 1326, 1420). Except for petitioner Heck, those assembled were not San Diego residents and had traveled from various points in southern California (Tr. 1246, 1315, 1322). From the parking lot, a group including petitioners Heck, Armin Moths, Ross and co-defendant Hohenstein went into the IRS office and confronted Revenue Officer Williams. Williams offered to discuss the case with petitioner Heck, but Heck insisted that the entire group had to participate and stated that he wished

to give his power of attorney to all of those present (Tr. 231-232). Petitioner Ross demanded that the property be returned to petitioner Heck "or else" (Tr. 232). During this confrontation, Special Agent Clovis arrived and advised the protestors that the property had been seized and that they would be subject to arrest if they attempted to rescue it or interfere with IRS officers (Tr. 232, 867-869). After hearing this warning, petitioner Ross replied that "if you can arrest 200 people at one time, sir, you are more than welcome to try" (Tr. 233, 870). The group then began to leave the IRS office. As petitioner Moths left, he said to Special Agent Clovis: "I'm going to get Mr. Heck's stuff back whether you like it or not, Mr." (Tr. 871). The same group reassembled in the parking lot, and petitioners went to a nearby office and conferred (Tr. 1131, 1160).

Shortly before noon, IRS agents Jack Dunlap, Robert Meyer, Joseph Rodriguez, and Clovis went to Heck Transfer and Storage. The Service had notified the San Diego Police and the FBI that a demonstration was planned for noon in front of the Heck firm. After arriving on the scene, Agent Clovis was told by FBI agents who were parked a short distance away that they would provide assistance if required (Tr. 818, 878). The IRS agents positioned themselves directly in front of the Heck building. Revenue Officer Williams, who was also present, was approached by petitioner Heck, who gave him a letter demanding that the property be returned by noon (Tr. 234).

As the crowd grew, petitioner Ross walked back and forth in front of the building making comments to the effect there was no death penalty in California and that any action could be taken against officers short of killing them to rescue seized property (Tr. 235, 341, 604). The crowd became agitated, and IRS Agents Clovis, Dunlap, Meyer and Rodriguez placed their badges conspicuously on their coats (Tr. 339-340). Petitioner Ross was overheard asking, "doesn't anyone have a rock?" (Tr. 341). Petitioner James Mitzner approached the agents and remarked to them that in another confrontation with the IRS, one of the IRS agents had been "so scared that he wet his pants" (Tr. 604, 970). Later James Mitzner said to Agent Clovis: "I hope you are big enough to stand behind those tin badges you have on" (Tr. 885). Petitioner Armin Moths and co-defendant Eric Moths discussed breaking down the door, and petitioners Heck and Charles and James Mitzner conferred together (Tr. 418-419, 738).

At about 12:30 p.m. a group of demonstrators gathered around petitioner Heck. Heck picked up a rock, and he and the others surged towards the door. Someone in the crowd shouted, "Let's go. Those S.O.B.'s cannot stop us now" (Tr. 422, 796-797). When petitioner Heck reached the door, he broke the glass with the rock and let himself in (Tr. 740-741, 889, 971). Agent Rodriguez, who was standing a short distance away, announced that he was a federal officer and attempted to make his way to the doorway where his fellow agents were struggling

with members of the crowd. Before the agent could reach the door he was grabbed and spun around by petitioner James Mitzner (Tr. 606-607). When Agent Rodriguez tried to arrest Mitzner, he was encircled by a hostile crowd. As the agent attempted to hold James Mitzner, he was hit by persons in the crowd and had to crouch to protect his face and groin (Tr. 608-609).

These events were witnessed by two students from an adjacent trade school, Robert Cotton and Timothy Lee Buster, and they saw that it was petitioners James, Charles and Steven Mitzner who grabbed Rodriguez and beat him. Cotton saw Charles Mitzner knee Agent Rodriguez in the stomach and chest while the other two Mitzners hit him across the neck and ribs. As Cotton watched, the Mitzners beat the agent until he fell to the ground (Tr. 521-522, 554-555). Buster saw petitioner Steven Mitzner attempt to throw Agent Rodriguez in the gutter, while petitioner Charles Mitzner hit him in the face and petitioner James Mitzner held him by his hair (Tr. 744-745). A photographer from the San Diego Tribune, Roger Wrenn, also saw the Mitzners hitting Agent Rodriguez and took a photograph (Gov. Ex. 7) of them striking the agent (Tr. 431).

FBI Agent Anthony M. Maloney saw Agent Rodriguez struggling with the three Mitzners and went to his aid. Steven and Charles Mitzner disappeared into the crowd, but Agents Maloney and Rodriguez subdued and arrested petitioner James Mitzner and turned him over to the San Diego Police (Tr. 819-

820). A few moments later, Agent Rodriguez spotted petitioner Steven Mitzner and attempted to arrest him. A struggle ensued between Agent Rodriguez and petitioners Steven and Charles Mitzner. This altercation was also observed by Robert Cotton, who saw petitioner Charles Mitzner knock down Agent Rodriguez. As Cotton watched, the two Mitzners kicked the agent in the head, back and shoulders, causing his gun to fall from its holster (Tr. 563, 610-611). San Diego Police officers came to Agent Rodriguez' assistance and arrested Steven Mitzner, but Charles Mitzner vanished into the crowd (Tr. 611-612).

When the demonstrators broke into the Heck building, IRS Agents Clovis and Dunlap attempted to enter to protect the seized property. Both agents met resistance. Agent Dunlap was pinned against a wall outside the door and hit on the head with picket signs (Tr. 520). When Agent Dunlap finally gained entry, he encountered petitioners Heck and Burnham and co-defendants Bates and Eric Moths. Agent Dunlap was struck twice on the side of the head by petitioner Burnham (Tr. 974). This attack was observed by IRS Agent Clovis (Tr. 890) and FBI Agent Douglas Graham (Tr. 1061-1062). Both agents helped arrest petitioner Burnham and co-defendants Eric Moths and Bates.

FBI Agent Carl Zarndt observed petitioner Armin Moths inside the building and saw him walk outside. Zarndt advised petitioner Moths that he was under arrest and asked him to step back inside because of

the large crowd which was gathering. Petitioner Moths refused to comply. When Agent Zarndt attempted to bring him inside he met resistance, and several other agents had to come to his assistance (Tr. 1041-1045). After petitioner Moths was taken into the building, he began to struggle violently and threw IRS Agent Meyer against a wall. Five agents were required to subdue him (Tr. 1064, 1045).

ARGUMENT

1. The federal courts of appeals have uniformly recognized that, in a prosecution for assaulting a federal officer under 18 U.S.C. 111, the government is not required to prove that the defendant knew that the victim of his assault was a federal officer. *E.g.*, *United States* v. *Ulan*, 421 F.2d 787 (C.A. 2); *United States* v. *Wallace*, 368 F.2d 537 (C.A. 4), certiorari denied, 386 U.S. 976; *United States* v. *Kiraly*, 445 F.2d 291 (C.A. 6), certiorari denied, 404 U.S. 915.[3] Petitioners, citing *United States* v. *Crimmins*, 123 F.2d 271 (C.A. 2), argue that in a

[3] As the court of appeals noted (499 F.2d at 793), *United States* v. *Rybicki*, 403 F.2d 599 (C.A. 6), cited by petitioners for the proposition that knowledge of the federal status of the victim is essential for conviction under 18 U.S.C. 111, turned on the special circumstance that the defendant was a mentally-impaired Korean War veteran who may have mistakenly thought that IRS agents were truck thieves and thus lacked criminal intent. Here, petitioners do not claim mental impairment. Moreover, the court instructed the jury that "an act committed or an omission made under ignorance or mistake of fact which disproves any criminal intent is not a crime * * *" (Tr. 1799).

prosecution under 18 U.S.C. 371 for conspiracy to violate Section 111 (count 3), such knowledge must nevertheless be shown, and they assert that the district court erred in not giving an instruction to that effect.[4] The question of *scienter* petitioners attempt to raise is currently before this Court in *United States* v. *Feola*, No. 73-1123, argued November 19, 1974. For the reasons advanced in our brief in *Feola*,[5] there is no difference between the *scienter* requirements of the substantive and conspiracy offenses. Since the underlying statute here does not require a showing of knowledge of the victim's federal status, such knowledge is not required to establish a conspiracy to commit that offense.

But this case should not in any event be deferred pending the decision in *Feola*. In that case, the assaulted federal officers were undercover agents, and that circumstance, combined with the fact that the defendant was hiding in a closet when the assault occurred, created uncertainty as to whether the defendant was aware of the victim's federal status. Here, by contrast, there is no doubt that the conspirators knew that the assault victims (IRS agents Dunlap, Rodriguez, and Meyer) were federal officers.

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[4] Since petitioners Burnham, Moths, and Steven, James and Charles Mitzner received only concurrent fines on the conspiracy count (count 3), this issue as to them would not in any event warrant this Court's discretionary review. See *Barnes* v. *United States*, 412 U.S. 837, 848 and n. 16.

[5] We are furnishing counsel for petitioners with copies of our brief in *Feola*.

The manifest purpose of petitioners' activities on May 9, 1972, was to confront IRS officers over the seizure of the Heck property, and the agents were wearing their badges conspicuously on their coats. It is inconceivable that petitioners were unaware of the agents' federal status.

2. At trial the district court ruled that the seizure of the Heck property was lawful (Tr. 247, 937, 1126) and instructed the jury that the seizure's legality was not an issue (Tr. 1795).[6] On appeal, the court of appeals noted conflicting precedents as to whether the legality of a seizure must be shown to establish an unlawful rescue under 26 U.S.C. 7212(b), but held that it did not have to reach that question in view of its reversal of the convictions for attempted rescue and conspiracy to rescue and its affirmance of only the assault and conspiracy to assault convictions. 499 F.2d at 783-784.[7]

The court of appeals properly ruled that even if the Service's seizure of the Heck property was unlawful, that would not constitute a defense to the

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[6] Petitioners argue that the seizure was illegal because: (1) 26 U.S.C. 6331 is unconstitutional since it authorizes seizure of a delinquent taxpayer's property without a hearing and (2) the Service failed to comply with procedural requirements necessary to effect a valid seizure.

[7] Even though the court of appeals expressed the view that examination of the constitutionality of 26 U.S.C. 6331 was unnecessary in view of its reversal of the convictions under counts 1 and 2, the court, in rejecting the petition for rehearing, analyzed the statute and found it to be constitutional. 499 F.2d at 792-793.

assault charges. The purpose of 18 U.S.C. 111 is to protect federal officers who are performing their duties. That purpose is not achieved if persons may resist federal officers in the performance of their duties because of a difference of opinion regarding either the scope or the methods used to carry out those duties. *United States* v. *Johnson*, 462 F.2d 423, 427-428 (C.A. 3), certiorari denied, 410 U.S. 937. See also *United States* v. *Jansen*, 475 F.2d 312, 318 (C.A. 7), certiorari denied, 414 U.S. 826. Society has an especially strong interest in minimizing citizens' use of violent self-help in resolving disputes with the government. Persons claiming to be aggrieved by an action of the government must assert that claim by pursuing a civil remedy, not by forcibly interfering with federal officers. See *United States* v. *Ferrone*, 438 F.2d 381, 390 (C.A. 3). Here, whatever petitioner Heck's actual tax liability and regardless of the legality of the seizure of his property, petitioners broke the law when they sought forcibly to interfere with the government agents rather than resolve the dispute through recourse to the courts. Petitioners' assertion that their assault on the agents was a lawful exercise of their First Amendment right to freedom of expression is spurious.

3. Petitioners' contention that they were denied a fair trial because of excessive courtroom security measures is answered in the opinion of the court of appeals (499 F.2d at 788):

> The trial court had the discretion to institute security measures on the last day of the trial,

including the presence of United States Marshals and the use of an electric magnometer. The trial judge had (a) received veiled threats in the mail (R.T. 134 and 1779); and (b) information that a demonstration was planned for the courtroom. (R.T. 1609, 1770). Spectators had been previously admonished for their loud comments. (R.T. 279).

The trial judge did not abuse his discretion. *United States* v. *Greenwell*, 418 F.2d 846, 847 (4th Cir. 1969); *Loux* v. *United States*, 389 F. 2d 911, 919 (9th Cir. 1968).

4. Petitioners' claim that the failure to record the testimony before the grand jury constitutes reversible error also is answered in the opinion of the court of appeals (499 F.2d at 788):

> Appellants made no timely motions before the court to have the grand jury proceedings recorded. Further, recording is permissive, not mandatory. F.R. Crim. P. Rule 6(d); *United States* v. *Trenary*, 473 F.2d 680 (9th Cir. 1973); *United States* v. *Daras*, 462 F.2d 1361 (9th Cir. 1972). In addition, appellants were afforded complete discovery and, as a result, were in no way prejudiced by the failure to record. *Reyes* v. *United States*, 417 F.2d 916 (9th Cir. 1969).

5. Petitioners' contention that the government withheld exculpatory evidence also is answered in the opinion of the court of appeals (499 F.2d at 791):

> This alleged error had to do with the government's alleged failure to produce a photograph allegedly taken by IRS Agent Hairgrove, which

allegedly shows an individual not identified as a defendant, striking Agent Rodriguez.

Appellants made no attempt to obtain this photograph at trial. Further, the photograph was among those shown to defense counsel at pretrial proceedings. While it was not specifically pointed out that this was an individual who hit Agent Rodriguez, additional individuals who hit Rodriguez, other than appellants, were described in the report made available to the appellants prior to trial. In addition, at the trial itself, Agent Clovis asked defense counsel if he desired the photograph in question, and was given a negative reply.

Counsel for defendants brought out the fact that others hit Agent Rodriguez and argued that there was an issue of mistaken identity regarding his clients. He repeatedly emphasized the picture taken by Hairgrove. (R.T. 1707-1709, 1714). The appellants were in no way prejudiced by not having the actual picture. As the government urges, they were convicted because of the overwhelming amount of eyewitness testimony regarding these assaults.

6. Petitioners' contention that 18 U.S.C. 371 is unconstitutional is frivolous. See, *e.g.*, *United States* v. *Edwards*, 458 F.2d 875, 883, n. 7 (C.A. 5).

7. The various attacks on the trial rulings lack substance.

a. Petitioner Moths' claim that he was denied his Sixth Amendment right of confrontation because the government did not call as a witness the agent he was accused of assaulting is answered in the opinion

of the court of appeals (499 F.2d at 789, n. 9), where the court adopted the language of the government's brief:

> Appellant A. Moths was found guilty in Count Six of assaulting and interfering with Special Agent Robert Meyer. During the trial, Agents Dunlap (R.T. 974), Zarndt (R.T. 1045) and Graham (R.T. 1064) all testified that they observed A. Moths assault Agent Meyer. Agent Meyer did not testify. His testimony was originally scheduled for rebuttal, but when the defense testimony did not weaken the government's case, the decision was made not to call Agent Meyer. This would have only prolonged the two-week trial being held during the Christmas holiday season. No attempt was ever made by any appellant to subpoena Agent Meyer.
>
> * * * * *
>
> Appellant could have called Agent Meyer if he had desired to do so. His right of confrontation was satisfied by this available opportunity. There is no evidence to indicate that the failure of the government to call Meyer was induced by any improper motive. His testimony would have been cumulative and the government was not required to call him.

b. Petitioner Ross, testifying in his own behalf, stated that the protestors had planned to telephone an attorney to seek an injunction to block the seizure (Tr. 1477-1478). The defense apparently offered this testimony as evidence that Ross' intent was to seek legal remedies rather than use self-help. During

his closing argument for the defense, the attorney for petitioner Heck (Mr. Sankary), referred to possible civil remedies (Tr. 1669). In that context the prosecutor, in his closing argument to the jury, stated that petitioners should have sought injunctive relief in the courts instead of taking the law into their own hands.[8]

Petitioner Moths argues that because the availability of injunctive relief in tax disputes is more limited than the prosecutor indicated, petitioners' convictions

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[8] The prosecutor stated (Tr. 1764 1765, 1773):

> Now, Mr. Sankary says that his client did not go into court on the civil side because it may have taken three or four years. You recall Mr. Armin Moths testifying, and he mentioned the word "injunction." There are things available to these clients, these defendants, called injunctions and temporary restraining orders. It takes a matter of hours to go in and find a judge and he issues that and he can stop the IRS. He can have that property returned. In fact, you may recall during the last election, there was some question about whether the polls were going to remain open and there was a judge up in Los Angeles—his name was Jerry Peck—and the people went to Judge Peck before the polls closed and Judge Peck had the authority; he could have kept those polls open by signing a temporary restraining order or injunction in a matter of minutes. That type of remedy was available to the people in this case. And, remember, they had talked to a tax attorney. Did they utilize that remedy? No. They decided to take the law into their own hands * * *.
>
> * * * The courts here in this country are the body the people go to, to interpret the Constitution, and you go into court and get an injunction; you get a temporary restraining order, you petition the courts and they hear your dispute.

must be reversed. However, the law does allow injunctive relief in tax disputes in exceptional circumstances (see *Trent* v. *United States*, 442 F.2d 405, 406 (C.A. 6)), and the prosecutor's remarks made the legitimate point that petitioners should have had recourse to the courts instead of to violent self-help. As noted above, it was the defense that first raised the subject of injunctive relief. Furthermore, the defense neither objected to the remark nor requested a curative jury instruction.

c. Petitioner Ross contends that his conviction should be reversed because the trial court refused to amend the jury oath to include a pledge of support for the Constitution. This argument, which cites no authority, is frivolous.

CONCLUSION

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

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